No. 90-1615

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MELVIN D. REUBER,

Petitioner,

v.

FOOD CHEMICAL NEWS, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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BRIEF OF RESPONDENT FOOD CHEMICAL NEWS, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

Whether the Court should grant a petition for writ of certiorari to review a decision of the United States Court of Appeals for the Fourth Circuit, sitting *en banc*, when:

a. the Fourth Circuit found that petitioner, a research scientist well known in his field, was a limited purpose public figure when he injected himself into a public controversy concerning the carcinogenicity of a pesticide by challenging the government's finding that the pesticide was safe and by lobbying state health officials not to use the pesticide;

b. the Fourth Circuit held that a publisher who does not entertain serious doubts about the truthfulness of statements in a newsworthy government document does not act with actual malice when it reports the contents of that document; and

c. the Fourth Circuit held that petitioner, under state law, could not sustain publication-of-private-facts and intrusion privacy claims against a publisher who reported the contents of an official government document that had been posted on a bulletin board and was being widely disseminated by others.

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF THE QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
I. INTRODUCTION	2
II. COUNTERSTATEMENT OF THE CASE	2
III. REASONS FOR DENYING THE WRIT	10
A. The Fourth Circuit Correctly Held that Petitioner Was a Limited Purpose Public Figure	10
B. The Fourth Circuit's Application of the Actual Malice Standard Is Correct and Consistent with Decisions of Other Courts	16
C. The Fourth Circuit's Judgment Dismissing Petitioner's Invasion of Privacy Claims Was Proper as a Matter of State Law and Does Not Raise any Constitutional Issue	23
IV. CONCLUSION	27

TABLE OF AUTHORITIES

Cases	Page
Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984)	23
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975)	25,26
Edwards v. National Audubon Soc'y, 556 F.2d 113 (2d Cir.), *cert. denied*, 434 U.S. 1002 (1977)	18
Fitzgerald v. Penthouse Int'l, Ltd., 525 F. Supp. 585 (D. Md. 1981), *aff'd in part and rev'd in part*, 691 F.2d 666 (4th Cir. 1982), *cert. denied*, 460 U.S. 1024 (1983)	11,15
Florida Star v. B.J.F., 491 U.S. 524 (1989)	25,26
Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)	11
Greenbelt Cooperative Pub. Ass'n v. Bresler, 398 U.S. 6 (1970)	18
Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657 (1989)	*passim*
Hollander v. Lubow, 277 Md. 47, 351 A.2d 421, *cert. denied*, 426 U.S. 936 (1976)	24,26
Hutchinson v. Proxmire, 443 U.S. 111 (1979)	13
McBride v. Merrell Dow & Pharmaceuticals, Inc., 800 F.2d 1208 (D.C. Cir. 1986)	15
New York Times Co. v. Sullivan, 376 U.S. 254 (1964)	18,26
Reuber v. Food Chemical News, Inc., 925 F.2d 703 (4th Cir. 1991)	14
Reuber v. United States, 750 F.2d 1039 (D.C. Cir. 1984)	19
Ryan v. Brody, 634 F.2d 726 (4th Cir. 1980)	17
Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979)	25,26
Time, Inc. v. Firestone, 424 U.S. 448 (1976)	11
Time, Inc. v. Hill, 385 U.S. 374 (1967)	26

Table of Authorities Continued

Page

Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287 (D.C. Cir.), *cert. denied*, 449 U.S. 898 (1980) 11,13,15

Yiamouyiannis v. Consumers Union of the United States, Inc., 619 F.2d 932 (2d Cir.), *cert. denied*, 449 U.S. 839 (1980) 15

Miscellaneous Materials

The Lincoln-Douglas Debates 52 (R. Johannsen ed. 1965) 2

Restatement (Second) of Torts § 652(D) 24,27

Rule 10, Rules of the Supreme Court of the United States 2

Virginia Resolutions of 1798 19

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BRIEF OF RESPONDENT FOOD CHEMICAL NEWS, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Food Chemical News, Inc. ("News")[1] respectfully submits that the petition for a writ of certiorari should be denied because the United States Court of Appeals for the Fourth Circuit correctly applied the law, because the case does not present a conflict among the circuits that requires resolution, and because petitioner has not raised a question of federal law that merits review.

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[1] The News has no parent company or non-wholly owned subsidiaries.

I. INTRODUCTION

This Court should review the Fourth Circuit's *en banc* decision only if it conflicts with the decision of another court of appeals, departs from "the accepted and usual course of judicial proceedings," or addresses "an important question of federal law which has not been, but should be, settled by this Court." *See* Sup. Ct. R. 10. Petitioner Melvin D. Reuber attempts to satisfy these strict standards by misrepresenting the case's facts and mischaracterizing the Fourth Circuit's correct but otherwise unremarkable holdings. Petitioner's arguments, in the words of Abraham Lincoln, are "specious and fantastic arrangement[s] of words, by which a man can prove a horse-chestnut to be a chestnut horse." *See The Lincoln-Douglas Debates* 52 (R. Johannsen ed. 1965). When the true facts and the Fourth Circuit's actual holdings are considered, petitioner's arguments collapse. The Court need not and should not review this case.

II. COUNTERSTATEMENT OF THE CASE

Petitioner would like the Court to believe that this case arose when a news reporter surreptitiously obtained a secret letter of reprimand from an individual's confidential personnel file, knew that the reprimand contained false statements, and published it even though the reprimand was wholly unrelated to any newsworthy matter. Petitioner's view of the case, however, varies greatly from reality.

Petitioner, for example, is hardly the unknown, reclusive laboratory scientist that he portrays. *See, e.g.*, Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit ("Petition"),

filed herein, at 2-3, 6, 21-25. When the events that resulted in this litigation unfolded, petitioner was widely known throughout the pesticide and environmental communities as a man who found chemicals to cause cancer when other researchers found them to be safe. *See id.* at 11a; J.A. at 955-56, 1986, 2349-51, 2359-60.[2] Petitioner was employed at the Frederick Cancer Research Center ("FCRC"), a federally owned and funded cancer research center. Pursuant to a contract with the National Cancer Institute ("NCI"), the FCRC is operated by Litton Bionetics, Inc. ("Litton"). *See* Petition at 2.

As head of FCRC's Experimental Pathology/Histotechnology Laboratory, petitioner's responsibilities included conducting research and publishing reports of his findings. FCRC policy contemplated that its researchers could publish personal reports in two ways—under the FCRC address or under the researcher's home address. *See* J.A. at 2580-81. If the report were to bear the FCRC address—and carry the Center's imprimatur—FCRC review and approval was required. *See id.* If the researcher used his or her personal address, FCRC review was not necessary. *See id.* Petitioner, however, continually violated the FCRC internal review policy. As the parties stipulated before trial, petitioner published, under the FCRC address, approximately 20 personal manuscripts that he had not submitted for review. *See id.* at 956.[3]

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[2] "J.A." references are to the Joint Appendix filed in the Court of Appeals. Petitioner requested that the Clerk of the Court of Appeals send Volumes I-IX of the Joint Appendix to this Court for filing.

[3] When petitioner accepted employment at FCRC, he signed

In his personal manuscripts improperly disseminated under the FCRC address, petitioner concluded that chemicals considered to be safe by other researchers actually were carcinogenic. *See* Petition at 11a; J.A. at 955-56. Petitioner developed his views on carcinogenicity while working at various federal agencies before he joined FCRC. For example, petitioner, at the request of the Environmental Protection Agency ("EPA"), had analyzed studies in which chemical companies concluded that certain chemicals were safe. Petitioner disputed those findings at public hearings, and the EPA subsequently banned the chemicals. *See* Petition at 4a; J.A. at 1623-28. Petitioner later reviewed 24 more industry studies of widely used chemicals and testified at Senate hearings that virtually all of the studies were "worthless." *See* Petition at 5a; J.A. at 1627-28.

Petitioner's unauthorized use of the FCRC address came to a head when he used an unpublished personal manuscript bearing that address to attempt to influence the outcome of a public debate concerning whether the pesticide malathion was carcinogenic. The malathion controversy escalated when the Mediterranean fruit fly ("Medfly"), a destructive agricultural pest, invaded California in 1980. *See* Petition at 5a. California officials proposed that areas infested by the Medfly be sprayed with bait coated with malathion. *See id.* In choosing malathion to combat the Medfly, the officials relied on an official NCI report that concluded that malathion was not carcinogenic. *See* J.A. at 2139.

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a "Statement of Publication Policy" and promised to obtain authorization prior to publishing under the FCRC address. *See* J.A. at 2579.

When persons opposed to the spraying needed evidence to support the campaign mounted against the safety of malathion, they turned to petitioner, as they had in the past concerning other chemicals. *See* Petition at 6a; J.A. at 2350-51.

Petitioner then sent the John Muir Institute ("JMI"), a California environmental group, a personal malathion study that he previously had prepared. In his study, petitioner criticized the official NCI malathion research and NCI's conclusion that malathion was safe. *See* Petition at 5a-6a. Despite the fact that his personal study criticized the official NCI position and that his manuscript had not been reviewed by the FCRC, petitioner used the FCRC address instead of his personal address on the cover page of his report. *See id.* at 6a; J.A. at 3172.

JMI included excerpts from petitioner's study in a handout opposing the use of malathion, which it distributed at the press conference in which California officials announced the plan to combat the Medfly with the pesticide. *See* Petition at 11a. Because petitioner's personal study contained the official FCRC address on its cover, the JMI handout not surprisingly described petitioner's study as an FCRC/NCI report. *See* J.A. at 2958.

Substantial confusion then ensued concerning NCI's apparently contradictory positions on the carcinogenicity of malathion. *See* Petition at 6a; J.A. at 957, 2141-44, 2148-49, 2151-53, 2289-90, 2298, 2931. This confusion caused California health officials to contact NCI to clarify NCI's position. *See* J.A. at 2139-42, 2930-32. The Medfly/malathion controversy, including the confusion regarding the apparent change in NCI's position, was widely covered by national and local

media. *See* Petition at 10a; J.A. at 2300-09, 2993, 2997-98, 3002-03. While hundreds of articles reported the "new" study released by "the NCI scientist," at least two articles mentioned petitioner by name. *See* J.A. at 958.

Petitioner continued to attempt to influence the outcome of the Medfly/malathion controversy even after California officials concluded that use of the chemical would not pose a public health threat. In a letter on official FCRC/NCI stationery, petitioner urged the head of the California Department of Food and Agriculture ("CDFA") to reconsider the decision to use malathion. *See* Petition at 13a; J.A. at 2937-38. In his letter, petitioner criticized the official NCI study and stressed the superiority of his scientific credentials. *See* Petition at 13a; J.A. at 2937-38. Petitioner sent copies of the letter to an official at the California Department of Health Services and to JMI. *See* J.A. at 2320-21, 2388-89, 2937-38.[4]

After receiving petitioner's letter, CDFA asked NCI about petitioner's study. *See* Petition at 6a; J.A. at 2597-99. In the letter, CDFA stated that "Dr. Reuber continues to make public statements by speech, telephone, and letter implying that he is a part of the National Cancer Institute, and he continues to challenge the quality of the work done by contractors to the National Cancer Institute and the quality of the assessment by Cancer Institute scientists." *See* J.A.

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[4] Petitioner also gave at least one interview opposing the spraying proposal, referred a member of Congress to JMI to obtain a copy of his malathion report, and sent an affidavit and a copy of his study to a California attorney who was attempting to enjoin the use of malathion. *See* J.A. at 958-59, 1673-77, 2389-90, 2997.

at 2597. According to the CDFA, petitioner's public statements about malathion "have created a 'cancer scare' of major proportions" and "are having multi-billion [dollar] implications and are giving the impression that the Cancer Institute may be administering programs of questionable competency." *See id.* at 2598. The CDFA then requested a statement as to whether NCI had changed its official position on the carcinogenicity of malathion. *See id.* at 2599.

NCI officials previously had asked Dr. M. G. Hanna, Jr., the FCRC director and petitioner's immediate supervisor, whether FCRC had published a malathion study. *See id.* at 1921. Dr. Hanna at that time spoke with petitioner, who had shown him a copy of the malathion manuscript bearing *petitioner's home address*. *See id.* at 1919-22, 2702. Dr. Hanna therefore had assured NCI that FCRC had not published a new malathion study. *See id.* at 1922. After the second inquiry from CDFA, NCI asked Dr. Hanna to investigate the matter further. *See id.* at 1818-21. NCI supplied Dr. Hanna with several documents that NCI had received from CDFA, including a copy of petitioner's malathion study bearing *the FCRC address*. *See id.* at 959-60, 1921-25, 2135-36, 2154-55, 2930-32.

Dr. Hanna confronted petitioner about the use of the FCRC address on the study and his letter to CDFA opposing the use of malathion and instructed the FCRC personnel assistant to investigate the matter further. *See id.* at 1750-51, 1924-25. Dr. Hanna then learned that petitioner had misused his FCRC/NCI affiliation on all but two of his personal manuscripts, and none of the papers had been submitted

for FCRC/NCI review. *See* Petition at 6a; J.A. at 1919-28, 1932.

After receiving this information, Dr. Hanna met with the director of NCI and then met again with petitioner. *See* J.A. at 3005. Petitioner admitted that his publishing of unreviewed personal studies under FCRC/NCI auspices was improper. *See id.* at 1924-27, 3005. Dr. Hanna advised petitioner on March 25, 1981 that, although petitioner would not be fired, he would receive a strong letter of reprimand. *See id.* at 960-61, 1634.[5]

In the reprimand, typed on official FCRC/NCI letterhead, Dr. Hanna admonished petitioner for "act[ing] in a most unprofessional manner, creating controversies that have both scientific and economic impact." *See* Petition at 175a. Dr. Hanna stated in the reprimand that he had "investigated and . . . found to be true" allegations that petitioner had acted unprofessionally and concluded that petitioner had committed "the most flagrant professional abuse that I have ever experienced in my scientific and administrative career." *See id.* at 175a, 177a. Dr. Hanna also noted that petitioner's actions had "negatively affected the agricultural and rural communities in California" and said that, by operating "under the guise of the endorsement of both NCI and FCRC," petitioner had created "public distrust and lack of

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[5] On March 25, 1981, before receiving the reprimand, petitioner wrote a letter of resignation but did not submit it on that date. *See* J.A. at 1690-91. After receiving the reprimand on March 26, petitioner was advised by his physician to take some time off from work. *See id.* at 2264. On April 24, after taking a vacation and attending a two-week conference, petitioner turned in his resignation. *See id.* at 1646-47, 2265.

confidence" in NCI. *See id.* Dr. Hanna also observed that petitioner, with a study not reviewed by FCRC, had challenged NCI's official position on malathion "through speeches, telephone calls, and reports." *See id.* at 176a. Dr. Hanna then warned petitioner that any future violation of FCRC's and NCI's publication review policies could result in "immediate termination." *See id.* at 178a.

Dr. Hanna sent copies of the reprimand letter to James Nance and Dr. Fidler at Litton and to Drs. Adamson, DeVita, Hartwell, and Payne at NCI. *See* Petition at 47a; J.A. 960, 1634, 2904.[6] A copy of the reprimand soon appeared on a public bulletin board at the EPA. *See* Petition at 34a.[7]

The letter also was quickly and widely circulated among persons in the chemical industry. *See, e.g.*, J.A. at 3111-12. For example, an unknown source sent a copy of the reprimand to Dr. William Hollis of the National Agricultural Chemicals Association, who in turn gave a copy to Jack Wise, an employee of Stauffer Chemical Company. *See* Petition at 47a-48a. Wise provided the letter to Catherine Cooper, the editor of Pesticide & Toxic Chemical News ("PTCN"), a weekly newsletter published by the News. *See id.* at 48a. PTCN has a circulation of approximately 1,300 government, academic, environmental, and industry subscribers. *See id.* at 7a.

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[6] In the copy of the reprimand printed in the Appendix to the Petition, petitioner does not show the "ccs" on the reprimand. *Compare* Petition at 179a *with* J.A. at 2906.

[7] Although it never has been established how the letter initially entered public circulation, petitioner admits that he gave the letter to an EPA employee to make copies for him. *See* Petition at 34a.

Ms. Cooper had known of petitioner's involvement in chemical issues since the mid-1970s, and PTCN had published 10-12 articles that mentioned petitioner by name. *See id.* at 130a-31a. Recognizing the newsworthiness of Dr. Hanna's letter, Ms. Cooper published an article that described and quoted extensively from the reprimand. *See id.* at 180a-84a.[8] Ms. Cooper "never had a doubt that the allegations [in the reprimand] were anything but true." *See id.* at 140a.

Petitioner then brought this litigation, which initially involved 13 defendants, including the United States, EPA, the News, and employees of NCI and Litton. All defendants but the News were dismissed before trial.[9] The Fourth Circuit ultimately ordered that judgment be entered on behalf of the News because petitioner, a limited purpose public figure, had not offered clear and convincing evidence of actual malice and had failed to establish elements essential to his state law privacy claim. *See generally id.* at 9a-38a.

III. REASONS FOR DENYING THE WRIT

A. The Fourth Circuit Correctly Held that Petitioner Was a Limited Purpose Public Figure.

Petitioner claims that the Fourth Circuit "has expanded the 'public figure' concept to embrace almost

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[8] The parties stipulated that the article accurately reported the nature and content of the reprimand. *See* J.A. at 961-62.

[9] One of the defendants was Dr. Hanna, who was dismissed from the case on the grounds that he was privileged to write the reprimand. *See* J.A. at 580. Libel law would be odd indeed if it allowed the official governmental speakers to make statements, but punished a republisher for fairly and accurately reporting them.

any private individual with some voluntary or involuntary contact with a matter of general interest to the public . . . ." *See id.* at 11-12. The Fourth Circuit's analysis, however, is loyal to this Court's teachings in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and its progeny, including *Fitzgerald v. Penthouse Int'l, Ltd.*, 691 F.2d 666 (4th Cir. 1982), *cert. denied*, 460 U.S. 1024 (1983).[10] Indeed, even the Fourth Circuit panel that affirmed the jury's verdict conceded that petitioner "may well be a limited purpose public figure for cancer research issues." *See* Petition at 61a n.19. Petitioner continues to cling, however, to his semantic argument that the News did not write about the particular public controversy into which he had thrust himself. *See id.* at 21.

Petitioner starts by narrowly defining the public controversy as the debate concerning the use of malathion to combat the Medfly. Petitioner then concedes, as he must, that the debate was a particular public controversy.[11] Petitioner, however, claims that

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[10] In applying the five-factor test set forth in *Fitzgerald*, the Fourth Circuit found that petitioner was a public figure because he had "significant access to channels of effective communication" and had injected himself into the Medfly/malathion controversy in order to influence its outcome, and because the controversy and petitioner's role in it existed at the time the defamatory statements were published. *See* Petition at 9a-15a.

[11] This case therefore is distinguishable from cases in which the resolution of the "controversy" would not affect anyone other than the immediate participants. *See, e.g., Time, Inc. v. Firestone*, 424 U.S. 448 (1976) (divorce of wealthy couple may be of interest to public but is not public controversy). *See also Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1297 (D.C. Cir.) ("If the issue was being debated publicly and if it had foreseeable and substantial ramifications for non-partici-

the PTCN article is not about the Medfly/malathion controversy. *See* Petition at 22.

Even if the public controversy is defined as narrowly as petitioner suggests, rather than as broadly as Dr. Hanna's reprimand requires, petitioner's argument fails.[12] The Court need look no further than the PTCN article and the reprimand to see the direct relationship between the reprimand and the Medfly/malathion controversy. *See* Petition at 184a. In the article, Ms. Cooper wrote that "[a]ccording to the letter, Dr. Reuber's stand on malathion and malaoxon challenged and question [sic] the competency of pathologists" who conducted the official NCI study. *See id.* at 184a. In the letter, Dr. Hanna placed many of his criticisms squarely within the context of the furor over malathion. *See, e.g., id.* at 175a ("Your mishandling of scientific data and your unrestrained interpretations of those data have negatively affected the economics of agricultural and rural communities in California . . . .").[13]

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pants, it was a public controversy."), *cert. denied*, 449 U.S. 898 (1980).

[12] In the reprimand, Dr. Hanna also criticized petitioner's involvement in a public controversy concerning another pesticide, picloram. *See* Petition at 175a-76a. Prior to the Medfly/malathion controversy, petitioner had traveled to Oregon to speak out against picloram. *See* J.A. at 1687-88, 2362-64. Petitioner's picloram manuscript also improperly bore the FCRC address. *See id.* at 3114. Before trial, the parties stipulated that "matters involving the carcinogenicity of pesticides are of legitimate public concern." *See id.* at 962.

[13] As the Fourth Circuit recognized, that reprimand also refers to petitioner's lobbying efforts, speeches, telephone calls, and reports challenging the competency of the government's malathion researchers. *See* Petition at 14a.

Petitioner argues that the existence of the Medfly/malathion controversy is irrelevant to his public figure status because "Cooper[] . . . did not publish her article to influence, or in the context of, the California controversy . . . ." *See* Petition at 23.[14] The Fourth Circuit properly rejected this flawed attempt to "introduce the subjective element of the author's intent into the determination of public figure status" in favor of the objective approach set forth in *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1293-94 (D.C. Cir.), *cert. denied*, 449 U.S. 898 (1980). *See* Petition at 14a. As this Court has held, it is the plaintiff's efforts to influence a public controversy—not the defendant's intent to report about that controversy—that determine whether the plaintiff has assumed the status of a limited purpose public figure. *See Gertz*, 418 U.S. at 345.

In an attempt to convince the Court that this case is similar to *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), petitioner portrays himself as a "reclusive scientist" who had little involvement in the Medfly/malathion controversy. *See* Petition at 22. As the facts demonstrate, however, petitioner voluntarily injected himself into this public controversy. *See id.* at 10a-15a.[15] Petitioner pursued his agenda by disseminating

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[14] Petitioner's argument is based in large part on the irrelevant fact that Ms. Cooper at trial did not recall whether she was aware of the Medfly/malathion controversy prior to reading the reprimand or whether she learned about it from the letter. *See* Petition at 172a.

[15] The Fourth Circuit relied on petitioner's voluntary acts to find that he was a limited purpose public figure. Contrary to petitioner's suggestion, the Fourth Circuit did not find him to be an involuntary public figure. *See* Petition at 24. Although

his report disputing the NCI's position on malathion to a prominent environmental group and an attorney who was engaged in litigation seeking to enjoin the use of malathion.[16] Petitioner directed at least one congressman to obtain a copy of his report from the environmental group. Petitioner's report quickly became the focal point in the Medfly/malathion controversy because it created substantial confusion concerning the NCI's position. This confusion received widespread media attention, including two articles that mentioned petitioner by name. Petitioner also gave an interview to a newspaper, in which he opposed the use of malathion. Moreover, after California health officials considered his report and rejected his position, petitioner urged them to reconsider their decision and take into account his supposedly superior scientific credentials. *See* Petition at 10a-13a.[17]

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petitioner claims he did not "voluntarily" enter the controversy because he acted in part through others, such as JMI, the Fourth Circuit properly declined the invitation to create an "artificial shield" for those who actively manipulate public opinion through third parties. *See id.* at 12a. The Fourth Circuit, in light of petitioner's voluntary actions in disseminating his study to influence the outcome of the malathion controversy, likewise rejected petitioner's argument that he could not be a limited purpose public figure because he wrote the study before the controversy began. *See id.*; *see also* footnote 16, *infra.*

[16] The Fourth Circuit's opinion, as reprinted in the Appendix to the Petition, contains at least one significant omission. The last sentence of the last full paragraph on page 12a should read: "Reuber invited attention by authoring *and by disseminating* a study which challenged the government's conclusions that malathion, a widely used pesticide, was non-carcinogenic." *Reuber v. Food Chemical News, Inc.*, 925 F.2d 703, 709-10 (4th Cir. 1991) (emphasis added).

[17] Petitioner's efforts to influence the Medfly/malathion con-

Finally, although petitioner concedes that his status as a limited purpose public figure is a question of law, he claims that the Fourth Circuit conducted an improper *de novo* review of the facts underlying that determination.[18] Contrary to petitioner's claim, the Fourth Circuit's opinion reflects that it did not improperly review the facts, but rather analyzed them under the same five-factor *Fitzgerald* test that the

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troversy were strikingly similar to those of limited purpose public figures involved in other public controversies. *See, e.g., McBride v. Merrell Dow & Pharmaceuticals, Inc.*, 800 F.2d 1208, 1211 (D.C. Cir. 1986) (physician held to be limited purpose public figure when his role in opposing controversial drug included testifying before FDA "about the perceived dangers of Bendectin" and giving expert testimony in litigation challenging drug's safety); *Waldbaum*, 627 F.2d at 1290, 1300 (supermarket executive held to be limited purpose public figure when his actions were covered by trade publications); *Yiamouyiannis v. Consumers Union of the United States, Inc.*, 619 F.2d 932, 933, 939 (2d Cir.) (scientist held to be limited purpose public figure based in part on his fifteen published scientific papers and on testimony he gave to congressional subcommittee disputing NCI's findings on fluoridation of water), *cert. denied*, 449 U.S. 839 (1980); *Fitzgerald v. Penthouse Int'l, Ltd.*, 525 F. Supp. 585 (D. Md. 1981) (researcher held to be limited purpose public figure when he promoted use of dolphin military technology through published research papers, lectures, and by appearing on one television program and in one article), *aff'd in part and rev'd on other grounds*, 691 F.2d 666 (4th Cir. 1982), *cert. denied*, 460 U.S. 1024 (1983).

[18] Petitioner's sole example of the Fourth Circuit's supposedly improper review of facts determinative of the public figure issue is not taken from the court's discussion of the public figure question. Instead, petitioner cites dicta from the Fourth Circuit's discussion of the actual malice standard concerning whether the reprimand was an official government document. *See* Petition at 25 n.10. The Fourth Circuit does not refer to that dicta in its public figure analysis. *See also* footnote 22, *infra*.

district court utilized, albeit reaching a different legal conclusion. *See* Petition at 9a-15a. The Fourth Circuit conducted nothing more or less than the appropriate *de novo* review of the facts that establish that petitioner was a limited purpose public figure.[19]

B. The Fourth Circuit's Application of the Actual Malice Standard Is Correct and Consistent with Decisions of Other Courts.

In holding that petitioner failed to present clear and convincing evidence of actual malice, the Fourth Circuit ruled, quite unremarkably, that a publisher who does not entertain serious doubts about the truthfulness of statements in a newsworthy government document does not act with actual malice when it accurately reports the contents of that document. *See* Petition at 22a, 28a. The court observed that the actual malice test in this case is related to the fair report privilege, which relieves publishers of the obligation to investigate the accuracy of government statements and documents. The Fourth Circuit held that the News did not act with actual malice when it published the already widely circulated official reprimand of petitioner. *See id.* at 20a, 22a-23a, 27a-32a.

Petitioner's attacks on the Fourth Circuit's holding fail both on their merits and in their attempts to raise an issue requiring this Court's review. First, petitioner claims that the Fourth Circuit's holding is contrary to the decision in *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989), in which the Court held that avoidance of the truth can support a finding of actual malice. *See* Petition at 11. Unlike

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[19] Even the district court recognized that the public figure issue was one of law that would be " 'carefully scrutinized by an appellate court.' " *See* Petition at 109a (citation omitted).

Connaughton, however, this case involves the republication of excerpts from an *official government document*, excerpts the News was privileged to republish under the fair report doctrine. This case does not involve a news gathering situation like *Connaughton* where reporters refused to interview a central witness and failed to listen to a tape provided to them of the very conversation that was the crux of the defamatory article. *See Connaughton*, 491 U.S. at 682-83. Moreover, the six sources interviewed by the reporters in *Connaughton* directly contradicted the facts reported. *See id.*

In contrast, no reason existed in this case for the News to suspect that any statement in Dr. Hanna's letter was false, and it was not unreasonable for Ms. Cooper to rely on Dr. Hanna's statement in the letter that he had investigated the charges and found them to be true.[20] Publication of the reprimand was no more a "deliberate avoidance of the truth" than any other privileged report of governmental action. The Fourth Circuit did not add "a new element to the actual malice standard, applying a 'fair report' privilege in a manner rejected by other Circuits." *See* Petition at 11.[21] Instead, the court, in dicta, merely

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[20] Because Ms. Cooper had no reason to doubt Dr. Hanna's accuracy, her decision not to investigate the matter beyond obtaining a copy of the official reprimand is not evidence of actual malice, even if the fair report privilege did not apply. *See Ryan v. Brody*, 634 F.2d 726, 732 (4th Cir. 1980) ("Certainly where there was no reason to doubt the accuracy of the sources used, the failure to investigate further, even if time was available, cannot amount to reckless conduct.").

[21] In his attempt to concoct a conflict in the circuits, petitioner cites only cases that do not involve reports of government doc-

explained that the actual malice standard relates to a centuries-old privilege that protects fair and accurate reports of governmental actions and documents. *See Greenbelt Cooperative Pub. Ass'n v. Bresler*, 398 U.S. 6, 13-14 (1970) (publisher does not act with actual malice when it fairly and accurately publishes, without further investigation, reports of governmental activities). *Cf. New York Times Co. v. Sullivan*, 376 U.S. 254, 274-75 (1964) (" '[T]he right of freely examining *public characters and measures, and* of free communication among the people thereon . . . has ever been justly deemed the only effectual guardian of every other right. . . . [T]he press has exerted a freedom in canvassing the merits and measures of *public men, of every description*, which has not been confined to the strict limits of common law.' " (quoting Vir-

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uments and the fair report privilege. *See* Petition at 15 n.6. The Fourth Circuit took pains to limit its holding to the facts of this case. *See id.* at 22a ("By recognizing a fair report privilege in these circumstances, we neither authorize employers to leak information from personnel files, nor suggest that the fair report privilege would always shield a news organization when reporting such leaked information.").

Likewise, petitioner attempts to convince the Court that the Fourth Circuit applied the fair report privilege in a manner rejected by other circuits and does so by citing the decision that announced the "neutral reportage" privilege, *Edwards v. National Audubon Soc'y*, 556 F.2d 113 (2d Cir.), *cert. denied*, 434 U.S. 1002 (1977). *See* Petition at 18. The Fourth Circuit, however, did not apply the neutral reportage privilege. The Fourth Circuit merely cited *Edwards* as one of a number of cases that stand for the proposition that a privilege that goes to the heart of a news organization's ability to report about governmental affairs—like the neutral report or fair report privilege—has constitutional implications. *See id.* at 18a.

ginia Resolutions of 1798 and Madison's Report thereto)).[22]

As the Fourth Circuit stated, the fair report privilege exists to:

> encourage[] the media to report regularly on government operations so that citizens can monitor them. In return for frequent and timely reports on governmental activity, defamation law has traditionally stopped short of imposing extensive investigatory requirements on a news organization reporting on a governmental activity or document.

Petition at 19a (citation omitted). The Fourth Circuit therefore appropriately recognized that the actual

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[22] Consistent with his dispute-everything approach, petitioner claims that Dr. Hanna's reprimand letter was not an official government action. *See* Petition at 17. The Fourth Circuit, however, based its finding in part on the holding in *Reuber v. United States*, 750 F.2d 1039, 1057 (D.C. Cir. 1984), in which the court recognized that *Reuber had alleged* (in order to try to maintain a *Bivens* action against Litton) that Dr. Hanna's letter "invoked the power and prestige of the National Cancer Institute so as to make the decision a governmental one in perception as well as reality." *See id.*; Petition at 20a. The Fourth Circuit properly rejected petitioner's attempt to take different positions in different cases. While petitioner lamely contends that the Fourth Circuit should not have relied on *his* allegations in another suit, he cannot dispute that the Fourth Circuit also relied on the unchallenged facts that the letterhead on Dr. Hanna's reprimand states that the FCRC is operated by Litton for NCI, a governmental agency, that the letter asserts that petitioner operated under the guise of the NCI, and that the letter "suggests that Reuber is being disciplined, at least in part, for undermining the public's trust in the National Cancer Institute." *See* Petition at 20a.

malice standard does not impose greater "investigatory requirements" on a news organization than does the fair report privilege. *See id.* at 22a-23a.[23]

The Fourth Circuit dismissed petitioner's argument that he had established actual malice and overcome his burden as a public figure. The Fourth Circuit rejected all seven findings that the district court erroneously believed demonstrated actual malice. *See id.* at 24a-32a.[24] Of these, petitioner challenges only one—that Ms. Cooper's recognition of a purported inconsistency in Dr. Hanna's reprimand does not establish clear and convincing evidence of actual malice. *See id.* at 16-17.[25]

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[23] Petitioner's argument emasculates the fair report privilege, as it would require a publisher to independently verify the truth of every newsworthy statement and document that emanates from government before it could republish it. This is especially apparent in this case, in which petitioner would have required the News to reinvestigate the matters investigated by Dr. Hanna before it could have reported or republished Dr. Hanna's findings.

[24] The Fourth Circuit reviewed the district court's opinion "mindful" that, under *Connaughton*, it did not have "free reign to revisit credibility determinations or to redetermine findings of historical fact." *See* Petition at 23a.

[25] Petitioner does not challenge the Fourth Circuit's findings that the following facts do not establish actual malice: that Ms. Cooper purportedly failed to assess the impact that the article would have on petitioner's reputation, that the source who provided Ms. Cooper with the reprimand might have been biased against petitioner, that the News' decision to publish the reprimand might have been influenced by its profit motive and political orientation, that Ms. Cooper, who had no reason to question the truthfulness of the statements in the reprimand, did not investigate the statements before publication, and that Ms. Cooper testified in response to a hypothetical question that

Petitioner argues that Dr. Hanna's reference to petitioner's "mishandling of scientific data" and "unrestrained interpretations" that had a significant economic impact and shook public trust in NCI contradicts his later statement that petitioner "may be correct in your interpretations." *See id.* at 31a. Petitioner asserts that Ms. Cooper's testimony that "I read the letter and I saw both sides" establishes *actual knowledge* that at least one of Dr. Hanna's statements had to be false. *See id.* at 16. Petitioner then claims that Ms. Cooper's later statements explaining what she meant when she said that she had seen "both sides" were contradictory and required a credibility determination by the district court, that the district court resolved that credibility question against Ms. Cooper, and that the determination cannot be reviewed. *See id.* at 16-17.

Not even the district court agreed with petitioner's theory. The district court did not view Ms. Cooper's testimony as *actual knowledge* of falsity, but rather as evidence of *reckless disregard* for the truth. *See id.* at 102a-03a.[26] The Fourth Circuit therefore was

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she might have published the article even if she knew that some of the statements were false. The Fourth Circuit also rejected the district court's finding that the purported failure to assess impact on reputation could by itself establish that Ms. Cooper harbored ill will towards petitioner. *See* Petition at 25a.

[26] Ms. Cooper testified that the purported inconsistency did not cause her to have actual knowledge of falsity:

> Q. Don't you understand those two charges are fundamentally inconsistent?
>
> A. He was talking specifically about certain data and then he was talking generally about his ability as

not obligated to defer to the alleged credibility determination concerning this testimony, as petitioner claims, but rather was required to review the evidence independently. *See Connaughton*, 491 U.S. at 694 (White, J., concurring) (trial court's determination of reckless disregard, unlike determination of actual knowledge of falsity, "is to be reviewed independently by the appellate court").

Conducting its independent review of Ms. Cooper's testimony, the Fourth Circuit correctly found that Ms. Cooper's testimony did not require a credibility determination.[27] "[T]he limited excerpt from Cooper's trial testimony [relied on by petitioner]," the Fourth Circuit said, "distorts her actual response to the question of harmonizing the two statements in the reprimand letter." *See id.* at 31a. "In reality, Cooper clearly explained that the reference to mishandling data referred specifically to data on malathion, while the second reference to interpretations being correct referred generally to Reuber's ability as a pathologist." *See id. See*

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a pathologist. I think they are quite different.

* * *

Q. So you don't see any, even potential inconsistency. . . ?

A. I think he is talking in one place about specific interpretations, having to do with malathion. I think in the—on the second page he is speaking generally.

See J.A. at 1973, 1975.

[27] There is no indication in the district court's opinion that it made the credibility determination argued by petitioner. *See* Petition at 102a-03a.

also id. at 157a-60a; J.A. at 1973-75.[28] The Fourth Circuit correctly found that such testimony was not clear and convincing evidence of actual malice. *See* Petition at 36a. The Fourth Circuit's independent review of the purported evidence of actual malice is correct, consistent with *Bose* and *Connaughton*, and does not require the Court's review.[29]

C. The Fourth Circuit's Judgment Dismissing Petitioner's Invasion of Privacy Claim Was Proper as a Matter of State Law and Does Not Raise any Constitutional Issue.

Petitioner urges the Court to grant certiorari to "squarely decide" three constitutional questions related to claims for invasion of privacy. First, petitioner invites the Court to decide whether the First Amendment prohibits recovery for the publication of private facts when actual malice is proved. *See id.* at 26. Second, petitioner asks "whether the First Amendment prohibits making a media defendant which issues a partially false publication liable for the injury caused to a plaintiff's privacy interests." *See id.* Third, petitioner postulates that the Fourth Circuit relied on "petitioner's public figure status to invalidate the pri-

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[28] The Fourth Circuit's review of Ms. Cooper's *entire* testimony, as opposed to petitioner's focus on one out-of-context answer, is required by *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), and *Connaughton. See, e.g., Bose*, 466 U.S. at 514 (appellate judges must consider entire record as it relates to actual malice issue in reviewing actual malice determination).

[29] Because the Fourth Circuit's holding that petitioner failed to present clear and convincing evidence of actual malice is correct, the court's ruling that the actual malice instruction to the jury was erroneous does not merit this Court's review. *See* Petition at 19, 16a-18a.

vacy verdict" and then invites the Court to consider adopting a "new" test that would balance the degree of a person's involvement in public activities against the extent to which the facts involved are private. *See id.* at 27. None of these questions, however, is presented by this case.

While petitioner now attempts to disguise, if not reshape, the invasion of privacy claims he presented at trial, the record is clear that petitioner's claims were Maryland state law claims for intrusion and wrongful disclosure of private facts. *See id.* at 65a. To recover under his wrongful disclosure theory,[30] petitioner was required to show that the article published (1) true private facts about him (2) in a highly offensive manner (3) about an issue not of public concern. *See Hollander v. Lubow*, 277 Md. 47, 351 A.2d 421 (relying upon Restatement (Second) of Torts § 652D), *cert. denied*, 426 U.S. 936 (1976). Actual malice is irrelevant to this type of privacy claim and therefore properly was not considered by the Fourth Circuit. Petitioner raises this constitutional red herring in a last-ditch effort to distract the Court from the Fourth Circuit's correct determination that he failed to satisfy any of the elements of either of his state law claims.

Petitioner's primary challenge to the Fourth Circuit's holding is that the reprimand was purely "private." In fact, however, as the Fourth Circuit correctly found, Dr. Hanna's letter was in the possession of several chemical companies, had been

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[30] Petitioner offered no evidence at trial to support his intrusion claim and does not make any argument relevant to it in his Petition.

posted on the EPA bulletin board,[31] and was in the public domain prior to its publication by the News. *See* Petition at 34a.[32] The court also properly rejected petitioner's arguments that the article was published in a highly offensive manner and that the reprimand was not a matter of legitimate public concern. *See* Petition at 35a. The Fourth Circuit reversed the invasion of privacy judgment solely on state law grounds, and the Court should not review that holding.

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[31] Paralleling his public figure argument, petitioner accuses the Fourth Circuit of exceeding its scope of appellate review in finding that the reprimand was in public circulation. *See* Petition at 28. Without any record support, petitioner argues that the jury could have disbelieved Dr. William Hollis's testimony that he saw the letter posted on a bulletin board at the EPA. *See id.* Petitioner represents that the Fourth Circuit "relied" on this testimony. *See id.* In fact, the Fourth Circuit noted that copies of the letter "were apparently posted" on the board. *See id.* at 34a. Furthermore, the Fourth Circuit relied principally upon the undisputed possession of the "private" letter by both Hollis and Wise, who were employed by a trade association and chemical company, respectively, that had no affiliation with FCRC or NCI. *See id.* Moreover, petitioner had successfully argued in another case that the letter was posted at the EPA.

[32] Like Maryland, this Court repeatedly has recognized that the privacy interest in publicly available information is weak at best. *See Florida Star v. B.J.F.*, 491 U.S. 524, 534-35 (1989); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 494-96 (1975). Moreover, contrary to petitioner's claim, the Fourth Circuit did not apply Maryland law to respondent, a media defendant, any differently than it would have applied it to Litton or a chemical company. *See* Petition at 27. Petitioner could not recover for publication of private facts against any defendant when the published information already was in the public realm.

In his second effort to create a constitutional issue, petitioner speciously urges that the Court should determine "whether the First Amendment prohibits making a media defendant which issues a partially false publication liable for the injury caused to a plaintiff's privacy interests." *See id.* at 26. That question already has been decided by this Court in the context of defamation and false light invasion of privacy claims.[33] Falsity, however, is not an element of and is irrelevant to petitioner's disclosure-of-private-facts invasion of privacy claim. *See Hollander*, 277 Md. at 58, 351 A.2d at 427 ("Taking them in order—intrusion, disclosure, false light, and appropriation. . . . The third requires falsity or fiction; the other three do not.").

Finally, petitioner suggests that the Court adopt a balancing test to evaluate whether a defendant has published "private" facts. *See* Petition at 27. The Court, however, already has employed such a balancing process in privacy cases. *See, e.g., Florida Star*, 491 U.S. 524; *Daily Mail Publishing Co.*, 443 U.S. 97; *Cohn*, 420 U.S. 469. Moreover, contrary to petitioner's characterization, the Fourth Circuit, re-

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[33] Petitioner assumes the publication is false even though the Fourth Circuit expressly did not reach the question. *See* Petition at 8a, 29a ("The evidence of actual falsity in Hanna's allegations is, not surprisingly, murky and the evidence that Cooper was on notice of their probable falsity is even more remote."). Assuming the publication was false, petitioner's remedy would be a cause of action based on either defamation or false light invasion of privacy. The First Amendment prohibits recovery under these causes of action in the absence of actual malice when the publication at issue concerns a public figure. *Time, Inc. v. Hill*, 385 U.S. 374, 387-88 (1967) (false light); *New York Times Co.*, 376 U.S. at 279-80 (defamation).

lying on this Court's guidance, applied such a balancing test in this case. *See* Petition at 36a. The Fourth Circuit compared the petitioner's privacy interest and degree of involvement in a public controversy to the interests of criminal victims who were denied recovery in this Court's decisions and concluded "that the public's right to know how its government functions in a significant public health controversy outweighs the privacy interest of a public figure who, unlike the crime victims denied recovery by the Court, voluntarily entered the controversy." *See id.*

In fact, the Fourth Circuit referenced the public figure analysis only to rebut petitioner's slippery slope argument that "every bureaucrat whose work has some impact on a matter of public concern will lose all privacy interests . . . ." *See id.* Consistent with Maryland law, the Restatement, and petitioner's own suggestion that courts should consider the degree of a plaintiff's involvement in public issues as part of the privacy balancing test, the Fourth Circuit considered petitioner's involvement in public issues as part of its balancing analysis. Far from being a novel constitutional issue, the "public figure" reference in the Fourth Circuit's opinion is simply part and parcel of the balancing of privacy rights undertaken by courts in all states that have adopted Section 652D of the Restatement (Second) of Torts. Not one of the three constitutional issues fabricated by petitioner is presented by the record in this case. The Petition should be denied.

IV. CONCLUSION

For the foregoing reasons, respondent Food Chemical News, Inc. respectfully requests that the Court deny the petition for a writ of certiorari.

Respectfully submitted,

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